No. 49.
Sup. Br. of Lambert Carlisle & Johnson for Appellants

Office Supreme Court U. S.
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Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1898.

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MARTIN F. MORRIS ET AL., APPELLANTS,

vs.

THE UNITED STATES.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANTS, WILLIS, AMERICAN ICE COMPANY, THOMAS W. RILEY, BARBOUR ESTATE, GREAT FALLS ICE COMPANY, VAN RISWICK HEIRS, JOHNSON ESTATE, AND KIMMELL HEIRS, CLAIMING UNDER NOTLEY YOUNG, BETWEEN THE LONG BRIDGE AND THE ARSENAL.

TALLMADGE A. LAMBERT,
For Appellants Aforesaid.

CALDERON CARLISLE,
WILLIAM G. JOHNSON,
Of Counsel.

LAW REPORTER PRINT.

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STATEMENT.

The bill, which was filed November 6, 1886, does not include the appellants above named among the defendants therein mentioned, notwithstanding they were all known to be within the jurisdiction at that time. Inasmuch, however, as the wharves and wharf sites claimed by them, respectively, are located within the metes and bounds (as delineated on the exhibit lettered "B" attached to the bill)

"of the land and water in the District of Columbia," alleged in the third paragraph to be—

> "affected by the improvements of the Potomac River and its flats in charge of the Secretary of War"—

it was deemed by them advisable to appear at the time named in the published notice—

> "and answer the said bill and set forth and maintain their respective right, title, interest and claim in the premises."

The answers, duly verified, were filed January 24, 1887. That of E. M. Willis (Rec., pp. 188–193) asserts exclusive ownership in fee simple of Square No. 270 and of the wharf sites, wharf and other improvements lying south thereof and included between the two parallel lines drawn perpendicularly to the south line of said square, the one from the southwest corner thereof to the channel of the Potomac River and the other from the southeast corner of said square to the river channel.

Square 270 was carved from that part of Notley Young's land known as "Duddington Pastures," consisting of about 400 acres, and extending from the Long Bridge to the Arsenal. At the time of territorial cession the southern limits of the square were partly submerged by the waters of the Potomac River. (Rec. Vol. 4, 1343.) At that time, and subsequently, the exclusive right of wharfing out into the Potomac River, in respect of this as well as of his other land adjacent to the stream, was expressly assured to and vested in Notley Young by the reciprocal legislation of Virginia and Maryland of 1785 and 1786. It was, therefore, while in the full enjoyment of this right—established as well at the common law as by special affirmatory legislation—that Notley Young, pursuant to the provisions of the Act of Congress of June 16, 1790, entitled "An act establishing the temporary and permanent seat of Government of the United States," and in conformity

with the terms of the owners' agreement with the President in April, 1791 (Rec., Vol. 6, pp. 269–98), on the 29th of June, 1791, conveyed his tract of land, with its appurtenances, to Beall and Gantt, in trust, for the purposes of a Federal city. (Rec., Vol. 6, p. 47.) Among other trusts, conveyance was to be made by the trustees to the Commissioners, who should be appointed pursuant to the Act of Congress of July 16, 1790, and their successors, for the use of the United States, of all such streets, parcels and lots *as the President should approve and deem proper.* As to the residue of the lots—into which the city was divided—a FAIR AND EQUAL DIVISION should be made between the owners and the public. All of said lots which might, in any manner, be divided and assigned to Notley Young should *thereupon*, together with any part of the said lands, if any, *which should not have been laid out in said city*, BE CONVEYED BY THE SAID TRUSTEES TO THE SAID NOTLEY YOUNG, HIS HEIRS AND ASSIGNS.

The "public appropriations" were to be paid for from the sale of lots awarded to the Commissioners at the rate of £25 per acre, "not accounting the streets as part thereof."

No other right of property vested in the United States than such as passed under and pursuant to the deed of trust.

The division between Young and the Commissioners prescribed by the deed in trust, took place October 18, 1794, whereupon Square 270 fell to the public. (Rec., Vol. 6, pp. 149, 150.)

By virtue of the previous contract between the Commissioners and Morris and Greenleaf of December 24, 1793, the former agreed to sell to the latter, among other lots, the lots falling to the public in Notley Young's land—

> "coupled with the proviso and expressed agreement that they, the said Robert Morris and James Greenleaf, were thereby entitled to such lots AND OF COURSE TO THE PRIVILEGE OF WHARFING ANNEXED THERETO."
>
> (Rec., Vol. 6, pp. 144–8.)

On the very day of the division with Notley Young and, therefore, as nearly simultaneous with the foregoing agreement as practicable and in pursuance thereof, the Commissioners conveyed Square 270 in fee to James Greenleaf by a form of certificate which by act of Assembly of the State of Maryland, passed in 1792, had been declared effectual for that purpose. (Rec., Vol. 6, p. 151–2.)

This sole conveyance to Greenleaf was subsequently expressly ratified by his co-contractor Morris in a written communication to the Commissioners dated November 5, 1794. (Rec., Vol. 6, p. 167.)

In 1817 Peter Lennox became the owner of Square 270. Before that time a wharf is reputed to have existed in front thereof and such a wharf he, himself, kept and maintained, and his heirs and assigns have continued to keep and maintain down to the present time with the full knowledge of the appellee and, until the institution of this proceeding, with its acquiescence and without hindrance or question from anybody. Record title is deduced (Rec. Vol. 4, 1972–83).

The thoroughfare now known as Water street, adjacent to Square 270, was laid out and constructed by Peter Lennox and other *mesne* grantors of the respondent Willis by reclamation from the water in front of said square and at his and their cost and expense, exclusively, no part whereof has ever been reimbursed. Although, by the provisions of Building Regulation No. 4, of July 20, 1795 (Rec., Vol. 6, pp.180–1), the said Peter Lennox and his heirs and assigns, including respondent, were entitled to the exclusive occupation of said thoroughfare, until reimbursed for its construction, regard for the public interests has operated to restrain the exercise of any such right.

It is submitted to be the true construction of the deed in trust that the grantor parted with just so much land, and just such appurtenances only as the deed expressly and by apt and appropriate language conveys. The streets were

donated, *qua streets*, and for their plain and appropriate uses of mutual benefit and convenience to the proprietor and the public, each of whom became vested with title to equal proportions of the lots abutting upon such streets. All land not laid down upon the authorized plan of the city in streets (thereby donated) or in public reservations (thereby sold), or in lots subject to division between the owner and the public, *i. e.*, all lands not actually platted, revested absolutely in the owner by expressed provision of the deed in trust.

Water street, so far from being the subject of cotemporaneous provision, either actual or theoretical, was not, in fact, constructed as a continuous thoroughfare until after the close of the civil war. (Rec. Vol. 4, 1480–1) Neither was the claim to the exercise of riparian right in connection with it advanced on behalf of the appellee, until after the lapse of three-quarters of a century—

> "during which said riparian rights had been exercised without question, and in immediate succession by the owners of the land next adjacent, as aforesaid, to said river."

The adverse possession of the wharf site and wharf for over 70 years of Peter Lennox and his successive assigns, including the respondent, has been attended by every common law incident of adverse possession. For a long time taxes were annually assessed upon the wharf by the municipal authorities of the city of Washington and of the District of Columbia; and the United States has never, in any manner or form heretofore attempted to interfere with the private ownership and control of said wharf. Relying upon the integrity of their title, respondent and those under whom he claims, have, from time to time, expended large sums of money, amounting in the aggregate to many thousand dollars, in the maintenance, repair and reconstruction of said wharf (whereof a plat is annexed to the Answer, Rec., Vol., 1, p. 184.)

May 18, 1891, by order based on stipulation of counsel which recites the transfer by respondent, Willis, of his right, title, etc., in and to the land and water claimed by him in his answer to the American Ice Company, the latter was substituted as purchaser in the place of the said Willis. And (according to the terms of the stipulation) the answer of said Willis "shall stand for the answer of said substituted defendant." (Rec., Vol. 1, p. 361.)

The appellant, Thomas W. Riley, asserts claim to an undivided half part of the land and water constituting the site of a wharf in front of Square 355 in that part of Notley Young's land which was assigned to him for his mansion, garden and graveyard pursuant to the provision of his deed in trust (Rec., Vol. 6, 195). It was in respect of this reservation that the City Surveyor, James R. Dermott, on February 28, 1798, in reply to the Commissioners said without dissent from them:

> "But Mr. Notley Young, claiming this part, principally for his improvements, and which has since been assigned to him on that account, it was considered that no difficulty could arise as the whole of that was likely to be in his possession, and none of it entitled to water privileges by contract, *but must be by law, therefore he may do as he pleases in selling.*" (Rec., Vol. 6, 217).

The wharf is known as "Riley's wharf." Appellant's title in fee simple vests by virtue of an uninterrupted chain of *mesne* conveyances from the original proprietor, Notley Young (Rec. Vol. 4, 2000–6), and, as in the case of his fellow appellants who are owners of sites in Notley Young's land known as "Duddington Pastures," possession of said wharf in private proprietorship has been open, notorious, uninterrupted and adverse for more than twenty years before the institution of this suit; neither has the same been questioned from any source, but, on the contrary, universally acquiesced in and, notably, by appellee.

Taxes (whereof appellant discharged his proportion,) have been annually assessed upon the wharf by municipal authority, and, in reliance upon their title thereto, appellant and his successive grantors for more than ninety-five years have held possession of the wharf site and expended, from time to time, large sums of money in the erection, maintenance and repair of the wharf and superincumbent buildings. The part of Water street between Ninth and Twelfth streets West was constructed solely by the private enterprise of the owners of this and contiguous wharves, for which no compensation has ever been made. Whatever may have been the original project relative to the location and construction of a Water street, certain it is that Notley Young entertained no purpose to part with such, the most valuable annexation and appurtenance to his land, without express words of grant and without any compensation whatever. A diagram of "Riley's wharf" appears opposite p. 152, Rec., Vol. 1.

The appellants James L. Barbour and James F. Barbour, at the time of answer (Rec., Vol. 1, 223–6), were lessees of the land and water covered by the structure known as "Bradley's wharf," lying in front of Lots 15, 16 and 17, in Square 390—another of the squares which had been assigned to Notley Young for his improvements. Lots 16 and 17 originally extended to the Potomac River, being in that part of the square which is delineated on the "Washington Map" as partly submerged. The part of Water street at the base of the wharf was, therefore, reclaimed from the water and by the private enterprise of William A. Bradley, former owner of the square, who constructed the wharf about the year 1825. Appellants claim to have expended no less than $15,000 or thereabout in improvement and maintenance of the wharf, and in fitting it for the conduct of their wood, lumber, coal and general wharfage business. The Messrs. Barbour, having purchased the wharf-site and wharf, together with Lots 15, 16 and 17, in Page,

Bradley and others' subdivision of Square 390, extending to the channel of the Potomac River, on the 22d of November, 1890, were by order of court, January 27, 1892, substituted for the defendants Powell M. Bradley, Frederick W. Bradley and Maria G. Bradley, and allowed the benefit of so much of their answer as relates to the property so purchased. (Rec., Vol. 1, 367–8.)

The appellant corporation, The Great Falls Ice Company, answered (Rec., Vol. 1, 142–4), claiming as assignee of a ninety-nine year lease of the wharf and wharf-site in front of Square 356 from the late William A. Bradley who died seized of the square and its riparian annexation. This square was, likewise, among those which were assigned to Notley Young for his improvements in respect whereof it was the contemporaneous construction that he possessed the right of wharfing by operation of law. This square is shown as well by the Dermot or Washington map (Rec. Vol. 5, p. 118), as by the Congressional Library chart of Young's improvements (Rec. Vol. 6, p. 398), to be partly submerged. The front of the square, as projected upon the city plan, was therefore incontestably, the site of the previous wharf, which was first constructed in 1825 by William A. Bradley, and has been in the open and adverse possession of his successive assigns (including the appellant corporation), to the present time. Water street, at the base of the wharf, was constructed by William Bradley, and at his exclusive cost. With other cooperating and contiguous owners he was never reimbursed. Mr. Bradley acquired title in fee simple by mesne conveyances from Notley Young. It is observable that, after the construction by Mr. Bradley of his section of Water street (fourteen years before the projection of a similar street on plan No. 2 of William Elliot), the south front of Square 356 actually projected beyond the south line of the street as it does today, and formed, as it continues to form the site of the wharf structure. The appellant corporation, at the time of answer filed, had expended no less than twenty-six

thousand dollars in the building, enlargement and improvement of the wharf and in the erection thereon of suitable warehouses (Rec. Vol. 4, 2079).

The defendants, Powell M. Bradley, Frederick W. Bradley and Maria G. Bradley, having, by deed dated April 1, 1890, recorded L. 1445, fol. 16, of the Land Records of the District of Columbia, transferred and conveyed to the Great Falls Ice Company, as owner, all of Square 356, with the ground opposite thereto on the south side of Water Street extending to the channel of the Potomac River and the wharves, buildings, and other improvements thereon, it was by stipulation and order of the court thereon, directed that the Great Falls Ice Company should be substituted in the place of the above-named Bradleys, and that their answer, so far as it relates to the property described in said stipulation, shall stand for the answer of the said Great Falls Ice Company.

The Bradleys, by their joint answer (Rec., Vol. 1, p. 178–186), claimed as heirs-at-law of William A. Bradley, deceased, and William A. Bradley, Jr., deceased—

> "all the real estate, etc., between the north line of a Street, now known as Water Street, and the channel of the Potomac River, and between two lines—one drawn due south from the southeast corner of Sq. 391, to said channel—the other drawn at right angles to said Water Street from the western angle of Sq. 356, to said channel, except a strip 193 ft. 8 in. north, at the western side or extension of Sq. 391, as delineated on the plat, 'Ex. A,' annexed to the answer."

Square 391, like Square 356, is shown on the Congressional Library chart before mentioned, no less than on the Dermot Map, as submerged in part. It was one of the squares assigned to Young for his improvements, and carried with it, by operation of law, the right to wharf out into the river. The Bradley title is deduced from Notley Young, and possession has been continuous from 1796 (Rec., Vol. 4, pp. 2006–14). Young was in, originally, under

grant from the State of Maryland, and re-entered by virtue of his deed in trust and the assignment thereunder of December 3, 1796, by the Commissioners of Squares 356 and 391, among others, for his improvements (Rec., Vol. 6, p. 195.) Phineas Bradley, father of William A. Bradley, in 1820, purchased Square 356 from Benjamin Young, who acquired by devise from his father, Notley Young. Possession has been continuous. In 1826 William A. Bradley purchased Lots 15 and 16 in Square 390, and in the year 1849 Lot 17 in the square, and in 1838 all of Square 391. On the site of these several properties wharves were constructed by Phineas Bradley about 1820, and by his son, William A. Bradley, about 1826, as more particularly explained in the answer. The section of what is now known as Water street was constructed by the ancestors of these respondents, wholly at their own cost, with no purpose whatever of releasing or relinquishing their appurtenant right of wharfing to the channel of the Potomac River.

Appellants, J. Harrison Johnson & Co., by their answer, which is signed by the late E. Kurtz Johnson (Rec., Vol. 1, pp. 154–9), claim so much of the land and water (delineated on "Exhibit B," annexed to the bill of complaint) as lies in front of Square 300, and is covered by two wharves, with their appurtenant buildings, known, respectively, as the "North" and "South" wharves, constructed about the year 1870—the first at an expense of about $8,500, and the other at a cost of $6,000.

The southern face of Square 300, it is claimed, is washed by the waters of Potomac River.

The title of the late E. Kurtz Johnson to Square 300 is deduced from the Commissioners to whom it fell on division and who, agreeably to their contract with Morris and Greenleaf and with the assent of Morris conveyed to Greenleaf, together with other lots in Notley Young's land with, "of course," the appurtenant right of wharfing (Rec., Vol. 4, pp. 1984–90). From that time to the present the successive

grantees of Greenleaf have enjoyed riparian rights in connection therewith. Mr. Johnson was induced to purchase said square of ground wholly because of its appurtenant right of wharfage, and he gave in the purchase thereof a far greater price than the value of the land without such riparian privileges would have warranted, or than he would have otherwise given. Relying upon the validity of his title, he and his firm expended large sums of money in connection with such wharves, with the full knowledge and acquiesence of the appellee, and the private ownership and possession thereof has extended over a period of 95 years. Taxes have, likewise been assessed, at times, upon said wharves and improvements by the municipal authorities of Washington and of the District of Columbia, and the complainant has never, by legislation of its Congress, nor by the interference of any authorized executive agency, heretofore asserted any claim to or interest in the land and water covered by said wharves in front of Square 300.

Mr. E. Kurtz Johnson having departed this life during the pendency of the cause, his widow and executrix, Mrs. Annie E. Johnson, was, by order of the court, substituted as party defendant in his stead.

The heirs at law of Mary A. S. Kimmell by their joint answer (Rec., Vol. 1, pp. 133–140) set forth and maintain their right, title, interest and claim to all the said estate and improvements lying south of the line of lot two (2) in Bradley's subdivision of Square 391 running along the northern boundary of the thoroughfare now opened and known by the name of Water street, included between two parallel lines drawn perpendicularly to the said lines of said lot two (2) from the northwest angle of said Lot 2 in Square 391 to the channel of the Potomac River, and from the southwest corner of the said lot to the said channel according to the plan marked "Exhibit A" and attached to the answer.

Title is deduced in unbroken succession from Notley

Young (Rec., Vol. 4, pp. 2027–31). Square 391 was carved from that part of Young's land, which, as aforesaid, was assigned to him for his improvements, and is represented alike on the Congressional Library plat and on the Dermot map as submerged on its northwestern face by the water of the Potomac river.

More than fifty years before the filing of the answer one or more wharves were built on the river face of this square by respondent's ancestors, William Lambell or Kellelum Lambell, or by both, who, together with the adjoining owner, William A. Bradley, at their own cost, cut down the high bluff between Lot 2 and the river on the site of the present Water street, and occupied the same with their ship yard and buildings pursuant to Building Regulation No. 4, of July 20, 1795. (See testimony Joseph H. Bradley, Rec., Vol. 4, p. 1457). No reimbursement of this cost has ever been made.

The children and heirs of the late John Van Riswick, show by their joint answer (Rec., Vol. 1, pp. 196–214) their right, title, interest and claim, under their said father, to so much and such part of the land and water included within the metes and bounds set forth in the third paragraph of the bill of complaint and delineated upon "Exhibit B" thereto annexed as lies in front of Square 503, and is covered by the wharf commonly known as "Van Riswick's wharf."

Mr. Van Riswick died April 27, 1886, seized in fee, besides said wharf and wharf-site, of Lots 8, 10, 12, 13, 14, 24, 25 and 26 in Square 503, which, on that event, passed to his several children and heirs-at-law pursuant to the scheme of division set forth in a certain conveyance in the nature of a covenant to stand seized to certain uses for their benefit made by him in his lifetime, to wit., on the sixth day of February, 1885, and duly recorded among the land records District of Columbia.

Square 503, on division with Young, October 18, 1794, fell to the public and pursuant to the terms of the agreement

with Morris and Greenleaf of December 24, 1793, was thereupon and on the same day conveyed to James Greenleaf (Morris assenting) who then, according to the agreement, became entitled, as "of course, to the privilege of wharfing annexed thereto." (See, for the record title, Rec., Vol. 4, pp. 2031–62.)

The wharf claimed by respondents was originally constructed by John Nicholson in 1797, and is, consequently, one of the most ancient, if not the oldest wharf on the river front. A plan of this wharf, as surveyed by Nicholas King, April 14, 1797, appears at page 120, Vol. 5, of the Record. It was afterwards known, successively, as "Bartle's," "McLean's," "Gunnell & Bird's," "The Corporation Fish Wharf," and finally, as "Van Riswick's wharf." At the time the wharf was originally constructed, the face of the square was washed by the Potomac River, and the King survey assigns to an imaginary water street, a location almost, if not wholly in the water, and across the base of the wharf. See, also, Forsyth's testimony (Rec., Vol. 4, p. 1359, explaining Exhibit W. F. 9, Rec., Vol. 6, p. 352.)

June 19, 1846, William H. Gunnell being seized in fee simple of Lots 14, 15, 22, 23, 24 and 25, in Square 503, conveyed them unto the corporation of the city of Washington—

> "together with all and singular the rights, privileges and appurtenances to the said lots and to each and every of them belonging or in any manner appertaining and all the privileges of wharfing and water privileges belonging and appertaining to lot numbered 16 in said Square, making, together, 144 feet in breadth of wharfing privileges, together with a right of way through a twenty-foot alley passing through said square to the north of said premises, which said right of way shall be extended west of said sixth street in the direction of the said alley into the Potomac river as far out as any wharves shall be built." (Rec., Vol. 1, p. 2045.)

On March 30, 1853, the corporation of the city of Washington, pursuant to divers enactments of its board of alderman and board of common council made on August 5, 1852, and September 17, 1852, conveyed said lots of ground to John Van Riswick in fee-simple with the like privileges of wharfing, as will be seen by inspection of the copy of the conveyance at pages 206–7, Vol. 1 of the Record. During eighty-nine years the possession and use of this wharf remained notorious and unquestioned and the right of private ownership thereof is only now, after the lapse of a century, being indirectly challenged by this extraordinary proceeding. As in the case of other wharves, taxes have, at times, been assessed upon this, and the respondents and those under whom they claim, have, with the knowledge of the appellee, expended large sums of money in the construction, maintenance and repair of said wharf.

This answer, like those of the other appellants, above named, is in the nature of a cross-bill, and the respondents submitting, thereby, that the disclaimer in the twelfth paragraph of the bill of complaint—

> "does not prevent the pretensions of the complainant, if established, from destroying the value of the wharves included within the area described in the aforesaid third paragraph of said bill,"

pray that they may be confirmed in their possession and title to said wharf, wharf sites and its appurtenances.

Replications to the respective answers were filed March 23, 1887.

No testimony having been adduced in support of the allegations of the bill, as against these appellants, a motion was filed September 27, 1887, in behalf of each, to dismiss the bill on that ground, among others. A copy appears (1 Rec., 215).

These motions having been certified to the general term for hearing in the first instance were, after argument, denied. (1 Rec., 229–230). Whereupon, all parties to the cause

proceeded to adduce testimony, oral and documentary, in support of their several and respective pretensions of right, title and interest in and to the land and water said to be affected by the improvement of the Potomac flats under charge of the Secretary of War, and included within the metes and bounds set forth in the bill of complaint and accompanying Exhibit B. The result is embraced within the seven printed volumes and the 2,735 pages of the Record now before the court.

NOTES OF ARGUMENT.

Are these Appellants Rightfully Before the Court?

The question depends for its solution upon *construction* of the Act of August 6, 1886. A just *interpretation* of the act would not seem to involve them. Nothing in its phraseology refers to them either expressly or by necessary implication. No bounds are therein assigned to the area supposed to be affected by the work going forward under direction of the Secretary of War. It is to construction, alone, that resort may be had for determining the scope of the legislation in question. The most obvious rule for construing the act is furnished by its subject-matter. This we find to be the "improvement of the Potomac River or its flats" that unformed mass lying (as respects the land and water claimed by these appellants) wholly in midstream between the two navigable channels of the river, and apart from and disconnected with the river front of the city. The act of August is *in pari materia* with the provision in the appropriation act of March, 1881, for a survey of the—

> "Potomac and Anacostia Rivers in the vicinity of Washington, D. C., with reference to the improvement of the harbor line and the raising of the flats so far as their improvement may be necessary to the

> improvement of navigation and the establishment of the harbor line,"—

and must be referred, for the ascertainment of its appropriate scope and limitation, to the work as already projected under the last named act, and as delineated on the elaborate maps and plans thereof, prepared by the Engineer Department and collected, together with the Engineer's Reports, in Exhibit M. R. 1, at pp. 288–324, Vol. 1 of the Record. In other words, the specification of "the improvements of the Potomac river," in the appropriation act of March, 1881, being complete and exhaustive, ought to control the construction, in that regard of the first section of the act of August, 1886. At the date of the latter act these improvements had been fully outlined and definitely limited. They were then well under way. It was not contemplated that they would involve the expenditure of a single dollar in the localities claimed by these appellants, neither have they done so nor will they do so.

The inclusion of the wharves between the Long Bridge and the Arsenal within the lines of complainant's Exhibit B, was purely arbitrary. It was made by Col. Haines, the officer in charge of the improvements—after, he writes, "several personal interviews with the District Attorney in regard to the matter," and he transmitted, as the result of these interviews, "a tracing from a map formulated by him, with the limits of the improvements indicated thereon." (Rec., Vol. 5, p. 3.)

When called upon to verify the copy of the map filed with Exhibit U. S. No. 1 he says (Rec., Vol. 2, p. 4): "I suppose that is a copy of the map we made. It has my signature to it."

On cross-examination (Ib., p. 9), he admits that, as to the area about which he is examined, lying southeast of the Long Bridge, that "nothing has been done in that area."

At page 37 he understands that the improvement is made to include the wharves, under "authority conveyed

by the appropriations act made in August, 1882!" and knows of no prior authority.

In view of the paucity of complainant's testimony on this point, and its inconclusive character, significance may be attached to the offer, in its behalf, by the District Attorney of the copy of Sheet No. 2 of the King Portfolio Map as *against all the defendants*—

> "for the purpose of enabling the counsel and the court to understand, by comparing it with Ex. U. S. 45, what is the *north line of the area which the Government claims in this case*, and for no other purposes whatever." (Rec., Vol. 2, 446.)

To the admission in evidence of the proffered map counsel for these appellants promptly objected, on the manifest ground that it fails to show that the land and water claimed by them is affected in any degree by the improvements in question. Exhibit U. S. 45 will be found opposite p. 76, Vol. 5, of the Record, where it is filed together with the copy of Sheet No. 2 of King's Portfolio Map.

It is respectfully submitted that no just reason exists for including within the area of improvement under charge of the Secretary of War the land and water claimed by these appellants, and that the attempt to do so, in and by Exhibit B to the bill of complaint, is arbitrary and without legal authority.

As to the Sufficiency of the Proceeding and of the Legislation Whereon it is Founded.

The standard of sufficiency is, of course, set by the Constitution. If the due process of law, which is assured to every citizen by the Fifth Amendment, really means, as we are told it does, in each particular case, such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for

that class of cases to which the one in question belongs (Cooley, Const. Lim. 356), it is by no means easy to reconcile this case either with constitutional requirement or constitutional guaranty. The "law of the land" refers the adjudication of facts to a jury, and this "crowning excellence" of the common law is made the arbiter of proprietary disputes involving the limitation prescribed by the Seventh Amendment.

This case and the legislation under which it is brought are, alike, anomalous. By the latter, jurisdiction is sought to be conferred upon the court equitable in its form, special in its application, and wholly at variance with the established and fundamental principles of its procedure. The bill is brought against unascertained parties—asserts no clearly defined title as against these appellants—and, as against them, invokes no determinate relief. Whatever may be the vaguely defined rights of the appellee they are clearly proprietary in nature, and such as depend for adjudication upon the intervention of a jury. They involve inquiry into questions of title, of ownership, of possession, of boundary—questions, in other words, of fact for the true ascertainment of which a court of equity is devoid of the appropriate appliances. This court has said in the case of Barclay *et al. vs.* Howell's Lessee, 6 Pet. 510, in defining the relative province of the judge and of the jury in a question of boundary:

> "It is as much the province of a jury to determine the limits of a lot in a city or town, as the limits of any tract of land however great or small. And, if the court, in a question of boundary, may fix the limits of the grant, and then say what the legal effect of it shall be, there is nothing left for the action of the jury."

The paramount questions in this case, as it involves these appellants, would seem to be (1) was there a grant of Water street? (2) What are the limits of the street so granted?

(3) What is the legal effect of the street so granted and so limited upon the respective claims of the complainants and of these appellants? The solution of each depends upon the investigation of facts, and such investigation, we submit, can only be made, legitimately, by a jury.

If it be claimed that the act in question, and the proceeding which has been taken thereunder, are referable, both, to the exercise of the eminent domain, we can only submit that it is equally impossible to reconcile the one or the other with the salutary requirement in that behalf of the Fifth Amendment of the National Constitution.

Was there an Original Grant of Water Street to the United States?

The majority of the court in 109 U. S. 642, rest affirmance of the lower court's decree upon the assumed existence of such grant. To be effective upon appellee's claim of riparian right, in connection therewith, such grant, if made at all, must have been made, admittedly, at the time of locating and laying off the bounds and contents of the capital city. For the precise ascertainment of what was thus laid off, we are remitted, by common consent, to the authentic plan of the city. Appreciating the paramount importance of this inquiry, counsel for the Government have devoted much of the intervening twelve years to the accumulation of evidence, documentary and oral, upon this point. A large proportion of the voluminous record is occupied with the results of their labor and research. The consequence is that the court will be assisted, in the determination of the case as now presented, by a more complete and systematic collation of facts than was, perhaps, possible in the preparation of the former case to the record of which, be it remembered, the United States was not a party. Although the evidence which counsel for appellee have thought proper to inject into the record is voluminous, it follows, by no

means, that the inquiry is necessarily involved or obscure or its adjudication difficult.

The United States contracted with the original owner on the basis, precisely, of an individual. It was not in by right of territorial conquest. Its succession to the sovereignty of Maryland, proceeded, avowedly, *upon acceptance of the terms and limitations of that sovereignty and not upon the imposition of additional terms of its own.* This is made evident by the Maryland Act of Cession of December 23, 1788, the Congressional Act of Acceptance of July 16, 1790, and the Maryland Act of December 19, 1791, ratifying the previous Act of Cession; whereby it is expressly provided that nothing in the said acts contained should be so construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein, otherwise than the same should or might be transferred by such invididuals to the United States.

Among the most valuable as well as valued "rights of individuals to the soil," existing at that time and since, was the right of property ceded by the seventh clause of the compact between Virginia aud Maryland on the 28th March, 1785, in these words:

> "The citizens of each State, respectively, shall have full property in the shores of the Potowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privileges of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river."

This was law at the time of cession; the right declared was solemnly reserved to the individual owner by the Acts of Cession, and the legislation declaring it was continued in force by the Congressional Act of February 27, 1801, affirming the existing laws of Maryland within the District of Columbia.

The court, in 109 U. S. *supra*, recognizes as undisputed

the title of Notley Young, prior to the founding of the city, to the enjoyment of his riparian rights for his private uses, and to the exclusion of all the world besides. While, in the course of the opinion the learned justice who delivered it called attention to the sovereign character of the States' compact of 1785 and claimed for Congress authority to change or modify it, he did not undertake to say that Congress has, in fact, ever changed or modified it. On the contrary, it stands today equally operative as a public guaranty of the citizen's right to full property in the shores of the Potowmack River as it did at the date of the convention. Consistently with the exercise of this title by the citizen, Maryland, on December 19, 1791, by virtue of the Congressional legislation of July 16, 1790, authorized the Commissioners, thereby provided for, "to license the building of wharves in the waters of the Potomac and the Eastern branch, adjoining the said city, . . . " but not "to one to build a wharf before the land of another."

In the exercise of this authority the Commissioners, on July 20, 1795, promulgated Reg. 4 (Rec., Vol. 6, p. 180).

The land and water claimed by the appellants as annexed to their several and respective lots and parcels of ground constitute precisely so much and such part of the shore of the Potomac River adjoining the land formerly owned by Notley Young as was pledged and guaranteed to him in full ownership, use and enjoyment by the compact between Virginia and Maryland of 1785, and which the court recognizes his title to at the formation of the city.

The location of this land, known as "Duddington Pastures," and consisting of 400 acres, is shown by the plat at page 2494, Vol. 7, of the Record.

It is not claimed on behalf of appellee that this full property in the shores of the Potomac River has ever been interfered with by the United States in the exercise of the eminent domain or like sovereign right. If the United States has acquired it from Young, or from any one of his

successive assigns, it must have done so by actual conveyance either of the shore itself or of the land to which the right of wharfing is inseparably annexed as a raparian appurtenance. It is not pretended that Young expressly conveyed the full ownership which he enjoyed in the shore to the public. The records show no such conveyance. It is claimed, however, that he conveyed all his land in trust for a Federal city, and, among other things, to be laid off in such streets as the President for the time being should approve; that the land was actually laid off for a Federal city, with lots, squares and streets, etc., and that among the streets which the President, at the foundation of the city, duly approved, was a projected street then and now known as Water street, which, lying adjacent to the river and before the land of these appellants, drew to itself, as by a species of legal legerdemain, the whole body of valuable riparian rights, full and exclusive property in which had been previously enjoyed by the uncompensated owner.

To justify the admission of this extravagant claim some evidence, at least—some affirmative evidence—ought to be required. It will not do to infer its stability from partially disclosed facts or mere inference, however the latter may be held to consist with speculations of what may be "essential to a great centre of population and wealth."

The United States, in the person of its greatest President, convoked the proprietors of the Federal territory on the thirteenth day of March, 1791, to settle upon the terms of a contract for the conveyance of their lands for a Federal city. The resulting agreement pledged them to the conveyance,—

> "to the President or Commissioners or such person as he shall appoint, by good and sufficient deeds in fee simple, the whole of our respective lands *which he may think proper to include within the lines of the Federal city*, for the purposes and on the conditions following," etc., (Rec., Vol. 7, p. 2183).

It is to this agreement, and the deeds made in effectuation of it, that resort must be had for the ascertainment of all grants and the limitation upon all grants made by the proprietors to the public. They were careful to leave nothing to the fortuitous result of intendment. They knew well what they proposed to convey and they conveyed no more and no less than what they intended. In a word, what they conveyed passed, to use the words of the court in Van Ness *vs.* The Mayor, by the use of "appropriate terms of art"—nothing by implication merely. Even if the draftsman of the deed in trust had been less careful than his work shows him to have been, and the inartificial use of language had laid the instrument open to a construction more beneficial to the Government than to the grantor, would it comport with the power and magnanimity of the former and its fiduciary attitude to the latter to claim the overweening advantages that might result from such inexpertness?

The proposal was to convey the whole of the proprietor's land *which the President might think proper to include within the lines of the Federal city, not the whole of his lands at all events.* This idea is extended to the deeds. That of Mr. Young was made June 28, 1791. *Habendum*—

> "the hereby bargained and sold lands . . . or such part thereof as may be thought necessary and proper . . . for a Federal City, with such streets, etc., as the President of the United States for the time being shall approve. . . . *And all the said lots which may in any manner be divided or assigned to the said Notley Young shall thereupon, together with any part of the said bargained and sold land, if any, which shall not have been laid out in said city, be reconveyed by the said Thomas Beall and John Mackall Gantt . . . to him, the said Notley Young, his heirs and assigns.*" (5 Rec., 46–8.)

It would be difficult to devise language better calculated than this to express the grantor's cautious reservation of all that did not expressly pass by his grant, or better qualified

to exclude the conveyance of any right of property by mere intendment. In this respect the deed in trust materially differs from the conveyance which the Kentucky Court comments on at such length in Rowan's Exrs. *vs.* The Town of Portland, 8 B. Mon. 232—a case relied upon in support of the majority opinion in 109 U. S. *supra*. The absence of any reservation of right to the grantor from the conveyance in that case is commented upon by the Court of Appeals of Kentucky in aid of the town's pretension; nothing whatever of property right was there left in the proprietor after his conveyance took effect. It was made, too, with express reference to the accompanying plat, and its construction was, of course, controlled by it.

The deed of Notley Young was informed throughout by the spirit of fairness and equality. Its execution was unattended by a limiting, controlling and explanatory plan. So much land was conveyed as the President might select, with such streets thereon as he might approve—the residue of unappropriated land to revert to the grantor. The President's choice could only be manifested by means of a map *yet to be made*, which should exhibit the contents of the Federal city, *and the President's sanction of such map would be at once the execution and the exhaustion of the power to select and appropriate* (Rec., Vol. 7, pp. 2274–76).

Such a plan was in course of preparation at the date of Young's deed, but was never perfected by its author, Major L'Enfant, whose perverseness occasioned its being withheld at the early sale of lots in October, 1791 (Rec., Vol. 7, 2204–7). A copy appears (Rec., Vol. 7, 352–3). The streets delineated upon this tentative plan all stop short of the water, and, while a few wharves are projected, their bulkheads rest upon the line of no defined or indicated street.

This plan was laid before Congress for information touching the progress of the city by General Washington December 13, 1791 (Rec., Vol. 7, 2208), but subsequently withdrawn. (Ib. 2241).

L'Enfant was discharged March 13, 1792, (Ib. 2212). In the meantime, Major Ellicott, who had assisted in the prosecution of his work of surveying, was employed to perfect the map of the city and have the same ready for engraving and submission to the President by the 23d of February, 1792. This plan was first engraved at Boston by Sam. Hill and proofs forwarded from Philadelphia by Mr. Jefferson, July 11, 1792. It failed, however, to show "the soundings of the creek and river." (Ib. 2214–15). It was afterwards engraved at Philadelphia by Thackara & Vallance, and a copy of the latter appears, (1 Rec., 324).

Like the L'Enfant map, of which it was an amplification, the streets all stop short of the water and the numerous wharves, along the front of Notley Young's land, are projected without referance to any defined or delineated street. This map, like its predecessor, never received the authoritative impress of the President's approval. It is true that President Washington, finding L'Enfant impracticable, commissioned Ellicott to perfect his plan in February 1791 (Rec., Vol. 7, p. 2211), and that he subsequently deprecated *unnecessary* departure from it (Ib., p. 2240); but it is, nevertheless, indisputable that his formal and final authorization of it as a whole and as a complete plan of the city is absolutely lacking. His correspondence on the subject of Davidson's Memorial exhibits nothing more than a preference for the delineation of ground about the President's Square on the Engraved Plan, over the delineation of the same ground in the work of L'Enfant. We repeat, the plan, as a whole, is totally without the impress of Executive approval. The reason is apparent from the Record. Soon after the Engraved Map was circulated, and as the field work proceeded, errors were disclosed. The location of squares along the water front was found to be erroneous. Many spaces existed which might, with propriety, be divided off into squares, and the course of the canal was not correctly delineated. Above all, the public appropriations

were incorrectly exhibited, or not at all. The surveying department had fallen into confusion. April 9, 1793, the Commissioners convoked a meeting of the surveyors—and to fix responsibility—made each man answerable for the result of his own work (Rec., Vol. 2, p. 693). James R. Dermot was employed to locate squares and lots upon the ground. He seems to have been regarded with jealousy and disfavor by the city surveyor, Major Ellicott, and his brother, and several acrimonious letters emanated from the latter and a Mr. Briggs, which were addressed to the Commissioners, on the subject of Mr. Dermot's alleged improper conduct. Specimens will be found in the Record, Vol. 4, pp. 1577, 1586, 1588. Their last communication, dated October 18, 1793, shows considerable impatience on the part of the Commissioners with their complaints. This was followed by the oral dismissal of Briggs in October, and the formal dismissal of Briggs and Benjamin Ellicott on the 28th of January, 1794. Major Ellicott was dismissed March 13, 1793, and, after being reinstated, at the instance of the President, was finally discharged in January, 1794 (Rec., Vol. 7, pp. 2221–27). The confusion into which the surveying department had fallen, as a result probably of these disagreements, is shown to some extent in a letter of Thomas Freeman to the Commissioners on the 21st of January, 1794 (Rec., Vol. 4, p. 1593). Thereupon the active employment of Mr. Dermot appears (Ib., pp. 1595–7).

On the 15th of June, 1795, Mr. Dermot is "directed to prepare a plat of the city, with every public appropriation plainly and distinctly delineated," etc. (Ib., p. 1599).

July 4, 1795, Thomas Freeman announces to the Commissioners the completion, on the 25th of June, 1795, of the survey of the city (Ib., pp. 1599–1601).

Mr. Freeman, who was Dermot's assistant, was directed on July 14, to make certain designations on a plan of the city, delivered for that purpose to him, and evidently what is now known as the "Washington" or "Dermot" map

and to return the plan by the following Saturday. On July 24, 1795, the Commissioners referring to the Dermot map (Ib. 1559) addressed the President as follows:

> "The plat forwarded gives a much juster representation of the shores within the limits of the city than the one published, and contains also an exact delineation of all the encroachments attempted to be made on the public appropriations." (Ib. p. 1601.)

Again, in a letter of November 24, 1796, the Commissioners, in evident reference to the completed Dermot plat, say:

> "A new plan of the city, with accurate soundings, being about to be published, it was thought advisable to mention the subject" [presumably of public appropriations] "to the President; and, also, the necessity of fixing a site for the University." (Ib. p. 1602.)

November 30, 1796, the Commissioners addressed the President thus, in reference to the same work:

> "We presume the plan of the city will enable you to point out the appropriations with sufficient accuracy, for the purpose of making such declaration" (Ib.)

March 2, 1797, President Washington executed an instrument defining the several public appropriations and annexed thereto the Dermot plan, as the authoritative map of the city, and requested the trustees to convey in conformity therewith. (Rec., Vol. 7, p. 2275.)

By accident the plan became detached in transmission and that circumstance was availed of by the unwilling trustees as a ground for withholding the desired conveyance. Repeated applications were thereafter made to the trustees by the Commissioners to secure compliance with the President's request, on June 22, July 19 and November 3, 1797. Influenced by objecting owners, the trustees continued obdurate.

June 21, 1798, the Commissioners, in their letter to President Adams, recite the casual omission of the plan from President Washington's act and transmit it for annexation to a new request to the trustees (Rec., Vol. 6, p. 204).

January 25, 1798, they mention the prior transmission of the plan in a tin case to the President (Adams) to procure direction to trustees to convey the streets and public property to the Commissioners (Ib., p. 2251).

On July 23, 1798, President Adams addressed to the trustees a communication wherein he recites the prior act of his predecessor, the omission of the plan, the fact that such plan of the city is now annexed, and requests conveyance, etc.

Attorney General Lee, January 7, 1799, referring to these successive acts of Presidents Washington and Adams pronounces them as final upon the question of the establishment of the Dermot map as the only authentic map of the city, in respect of which the preceding plans of L'Enfant and of Ellicott were merely essays (Rec., Vol. 6, p. 293–6). See, also, report of Commissioners to Congress (Rec., Vol. 4, p. 1610), and of Mr. Dennis, chairman of the Congressional Committee (Rec., Vol. 6, p. 296).

The intrinsic evidence is irresistible that Attorney General Breckenridge had not before him the foregoing correspondence relative to the Dermot map when he wrote his opinion, April 5, 1806; otherwise, he could not have committed the gross error of supposing that the Engraved Plan had been attached to the President's request.

In view of this manifest error, due, doubtless, as in the case of Mr. Wirt's second opinion, to the absence of requisite data, the observations of Mr. Breckenridge (Rec., Vol. 7, p. 2275–6), are applicable exclusively to the Dermot map, and correctly indicate its conclusive authority.

A copy of the Dermot or Washington map appears at page 119, volume 5, of the Record. It shows no street intervening between the squares and the water line in Notley Young's land. A Water street extending in front of Squares 1026, S. 1048, 1067 and 1079 on the Eastern branch of the

Potomac is alone exhibited. A single wharf opposite Square 503 is shown. This was probably Nicholson's wharf, now owned in common by two of the appellants.

The numerous and important discrepancies between the tentative effort of Ellicott—the engraved map—and the perfected plan of Dermot, is strikingly manifested by the testimony of John Stewart (Rec., Vol. 2, p. 1545).

The truth of the matter is, that no provision whatever, had been made at the date of the President's approval of the Dermot map for the location of such a thoroughfare as Water street (Vide Lee's Opinion, Rec., Vol. 2, p. 663; King's letter of March 8, 1797, Rec., Vol. 4, pp. 1602–3).

The sole intimation that such a street was so much as contemplated is furnished by some of the returns of squares made by subordinates of the surveying department pursuant to instructions by the Commissioners of April 10, 1793, previous to which time no such returns had been required. The words "water front," "Water Street" and "front on Water Street," are therein used indiscriminately. (See Stewart's Deposition, Rec., Vol 4, p. 1673–4 *et passim.*) The call by these returns, or a part of them, is no more conclusive of the existence of Water street than it would have been of a First street, an A street, a B street, or the like. To so claim would be, in truth, "to give to airy nothing a local habitation and a name," or, more startling still, to erect the fanciful call of a surveyor's assistant into a muniment of title! Is it conceivable that, in a suit between private individuals, the court would lend a patient ear to pretensions based on such mere "baseless fabric of a vision?" Are the valuable rights of these appellants, after more than a century of uninterrupted enjoyment, to be frittered away on the flimsy pretext that a street, whose inception, under private auspices, is not earlier than 1826, and whose public existence began only twenty-four years ago, was called for, without authority and arbitrarily, among the boundaries of certain squares four years before the establishment of the city's only plan which, when established, distinctly contra-

dicted the existence of such thoroughfare in the location now assigned it? It appears, moreover, from Stewart's testimony (Rec., Vol, 2, p. 666), that the *originals* of these returns of squares *do not exist.* We are remitted, therefore, as for a muniment of appellee's title, to bare, unauthenticated copies!

Whatever was the record proof in the Steamboat Cases relative to the authority of Division Book No 1, it is submitted that it is entitled to equal credit with all other municipal records in the office of the officer in charge of the Public Buildings and Grounds in the light of their custodian's testimony in this case (Vide Stewart, Rec., Vol. 4, p. 1502). It is submitted, therefore, that these appellants are fully as well entitled to every just inference that can be drawn from the entries of water frontage reproduced from said Division Book 1 (Rec., Vol. 4, pp. 1536–1540), as the appellee is to the strained construction which it is sought in its behalf to place upon the alleged boundary calls on the returns of squares.

On July 25, 1798, the Secretary of State returned the plan of the city of Washington to the Commissioners, annexed to the President's Act authorizing the trustees to convey the streets, etc. (Rec., Vol. 2, p. 661).

After such executive approval nothing remained to be done by the President in the execution of the trust confided to him by the grantors of the deeds in trust, according to the concurrent opinions of Attorneys General Lee and Breckenridge and Wirt. *His power in this behalf was exhausted.*

The Only Claim that Can be Legally Made to the Existing Water Street is Such as May Arise Upon Implied Dedication.

The power of the President to approve streets was exhausted, as we have shown, by the approval of the Dermot Map. That was a complete execution of his trust on behalf of the United States. Only such streets as were designated upon the map could have passed in fee simple to the public. If a street was thereafter laid out and

opened (and many have been), even though it may have been with the formal approbation of the President, does it require the citation of authority to show that its use is merely in the nature of a public easement unattended with any appurtenant right whatever? Such, we claim, to be the predicament of Water street.

In 1797—at the date of the approval of the Dermot Map—the street was nonexistant, theoretically as well as actually. It may have been a project in the minds of some, and notably in the busy and active brain of the ingenuous Nicholas King. The Commissioners, however, exhibit a very nebulous conception of its utility, probable course and effect. (See Building Reg. 4, and their observations thereon to the President, July 24, 1795, Rec., Vol. 6, pp. 180–4). Whether a street should be made, and if so, whether by the proprietor or the public was equally uncertain in their contemplation.

"The President," they say under date of August 10, 1795—a month after Dermot had been commissioned to make his plan—

> "desires that a publication of the regulations respecting wharves might take place as soon as possible. The draught now standing in the shape of a report, it appears to be improper to determine finally on this subject. It is by no means clear whether our report compels *the proprietors of wharves* to fill up and make a street 60 feet between *the last building on such wharf* and *the channel*, or only to leave a space of 60 feet to be hereafter made and at the expense of the public. . . . It is more than probable that if the proprietors are to be compelled, at their own expense, to make a street of 60 feet, when a depth of water of 12 or 15 feet may, in general, be calculated on, that we shall have few wharves in the city of Washington during the present century." (Ib., 184–5.)

Again (p. 185), the embarrassment of the Commissioners

becomes more acute: "You will observe," they say in writing to their colleague, Alex. White, August 12, 1795—

> "that when the President comes to sum up the leading regulations, in his opinion necessary to be published, that *he totally omits a street between the termination of the wharves and channel*, and that he presses an immediate publication. There is great reason to fear that the single circumstance of leaving a space of sixty feet between the termination of the wharves and channel will often end the wharf in four, five and six feet of water. Mr. Hoban, agent for Mr. Barry, says the intended wharf in his case, which he estimates to cost upwards of twenty thousand dollars, will terminate in four feet or water."

Concluding the scheme of such a street to be impracticable, the Commissioners virtually abandon it in a letter to the Secretary of State of August 17, 1795. (Ib., p. 186–7.) The general uncertainty on the subject of such a street is no less exhibited in the Commissioners' letter to Uriah Forrest, February 11, 1795 (Rec., Vol. 6, p. 170), wherein they say: "It is yet uncertain what the President may determine about the street (Water) mentioned."

Is it not evident, from these excerpts, that, as late as August, 1795, while the Dermot map was in preparation, neither the President nor the Commmissioners entertained a definite project of a Water street, such as is now claimed for the appellee? The former simply ignored it, the latter, after tentative speculation touching its course, width *and proprietorship*, dismissed it. Is it matter for surprise that it is wholly omitted from the river front on the Dermot map? Dermot could only have placed it there upon his own motion, since he had neither the President's nor the Commissioners' authority for so doing. Hence, in his answer to the Commissioners (Rec., Vol. 6, pp. 210–218), while he claimed that his map was made "for the purpose of connecting the channel of the Potomac and Eastern Branch with

the squares in the city," he makes mention of no other Water street than the short strip which is so delineated on his map southeast of Carrollsburg, on the Eastern Branch.

On September 30, 1796, John Nicholson claiming, as undisputed, the wharf at "Annacostia Point" which had fallen to him in a late division of property with Mr. Morris, urges upon the Commissioners more definite measures touching the regulation of wharves (Rec., Vol. 6, p. 188). The wharf to which he alludes is evidently the one mole projection shown in Dermot map opposite Square 503.

As late as October 28, 1800, appears the following entry in Book 1, "Calculations and Divisions," under division with Notley Young's heirs:

"28 Oct. 1800. 473, by claim as original proprietor, 633 f. 4 i., w. f." (Rec., Vol. 6, p. 191)—in connection with other squares similarly divided at earlier dates.

Surely it will not do to say of this part of the Record that it is not equally authentic with other parts which make, apparently, for the appellee, when, as we have shown, the common custodian pronounces all equally entitled to credit.

That the project of a Water street was near to the heart of Nicholas King is evident from his frequent letters on the subject to the Commissioners and the memorial which he incited, and doubtless drew, on behalf of the proprietors. His efforts in this direction extended from 1796 until 1803.

This, however, *was King's individual project*, promoted by his sole and individual efforts. It differed, but little, from the illusory suggestions of the Commissioners with respect to a 60 foot street between the wharf and the channel. To make either street it was necessary to reclaim land from the water. Of the seventeen squares between Fifteenth street and Sq. S. Sq. 506, the faces of five were actually submerged, and the bluff which supported the others, left it doubtful whether they would not actually form the shore line when graded. In view of the formidable difficulties and expense

of making such a thoroughfare, the President declined to saddle it upon the public by approving the street, and the Commissioners did not feel justified in exacting its construction at private cost. The situation is clearly exhibited in the Commissioners' report to Congress, March 23, 1802, wherein they say:

> "The intention of the memorial was to persuade the President that it was necessary to cause a complete plan of the city, including a Water street, to be made and established, so that there could be no departure therefrom. It was referred to the Attorney General, who advised against making a new plan because 'the plan to which the President's signature is annexed is sufficiently authenticated, *and supersedes all other plans*; against making a plan unalterable in the sense of the memorialists, because the appropriated grounds may be wanted for one purpose at this time, and for another at a future day; and against making the proposed Water street in the present state of the city funds, because it was more necessary to build houses than to reclaim land out of the water.'" (Ib., 1610).

In King's first letter on the subject, December 3, 1796, there is no suggestion of doubt as to the absence of provision for a Water street. On the contrary, he positively affirms—

> "that I am ignorant of any general plan on which the streets in the vicinity of the water are laid down as permanently established." (Ib., 1627).

This observation includes necessarily as well the L'Enfant and Engraved Map, with both of which he must have been familiar, as the Dermot Map. Speaking of the embarrassment resulting from this circumstance to the exercise of wharfing privileges (for he never seems to have contemplated the loss of such privileges as a consequence of the intervention of a water street), he adds:

> "Much of the water property in the Potomak, from the point upwards to the President's Garden," [all the property in these appeals] "is in this predicament."

On April 5, 1797, King reported his plan and survey of the wharf for Nicholson in front of Square 503 (Rec., Vol. 6, p. 268.) He had already, March 8, 1797, exhibited his series of plans of—

> "that part of the city which lies in the vicinity of the water, and includes what is called *water property; from the confluence of Rock Creek with the Potomak to the public appropriation for the Marine Hospital on the Eastern Branch.*"

He then indicates what *appeared to him* to be the most eligible course for Water street *with the necessary alterations in the squares already laid out*, etc. He concludes, properly enough, with a disclaimer of knowledge touching the power of the Commissioners to effect his desired improvement, but insists upon its salutary influence upon the prosperity of the city. (Ib. 1602–3.) King, again, to the Commissioners on June 22, 1798, in pushing the claim of his client, Robert Peter, desires to ascertain:

> "What rights are attached to the west front of Square No. 8 and how bounded on Water street, *if such a street is admitted.*"

But why multiply instances from the Record of what must be evident from a most casual inspection of the approved map, *i. e.*, the total absence of a projected water street from the Potomac front of the city?

The enthusiasm of King for improving the water front led to his project for completing, as he thought, the plan of the city in that direction by his Portfolio Map—supposed by counsel for appellee to be "the elegant and descriptive work" referred to in a communication from Mr. Davidson to

the Commissioners of August 14, 1797 (Ex. U. S. 48.) It may be sufficient to observe of this work that it never, in fact, received the President's approval. Neither would such approval have been effective, for, as was stated by Attorney General Breckenridge, albeit, under misapprehension of the true map annexed to President Washington's Act of March 2, 1797:

> "The proprietors of the soil had a right to annex such conditions and limitations to the grants as they judged proper. The President, who was their trustee, has executed, so far as regards the present question, his trust. He has determined the plan. He had the exclusive power to do so. *He has completely expended that power, and it is immutable, not only by his successors, but by Congress itself.*" (Rec., Vol. 7, p. 2276).

As we have shown, it was the Dermot map alone to which these observations were applicable since that map alone had been annexed to the act which formed the predicate of the Attorney General's opinion. It is to that act and to that plan, informed by the agreement which is embodied in the deeds in trust, that resort should be had for the just and proper adjudication of this branch of the pending cause.

If the proposition just enunciated be correct, it necessarily follows that the approval by President Van Buren, in 1839, of what is known as the Elliot Plan No. 2, of wharves and a Water street in connection therewith (Rec., Vol. 1, p. 324) operated, not to establish the fee in the United States as would have resulted from the President's approval of such a street had it appeared on the Dermot map, but to sanction the acceptance by the corporation of Washington of the dedication of the land for such street by its private owners.

As occasion arose and the convenience of wharf owners demanded ways were laid off at various points on the line of what is now known as Water street. These were designed by the

proprietors to afford access to their several wharves. The construction, in some instances, was through the water, and the necessary filling was made with material from the crown of the bluff which constituted the river shore. In other cases the way was dug along the base of the bluff. However promotive the way thus constructed might prove of the prosperity of the city, when ultimately called into being as a continuous street, it would be not as property belonging to the United States under convention with the proprietors but as the property of private owners over which the public enjoyed a right of way or easement by virtue either of express grant or implied dedication.

The owner who dedicates to public use, as for a highway, a portion of his land, parts with no other right than a right of passage to the public, and may exercise all other rights of ownership not inconsistent with such dedication.

> Irwin *vs.* Dixion, 9 H. 31.
> Railroad *vs.* Schumier, 7 Wall. 289.

The deposition of the late Joseph H. Bradley, a distinguished lawyer and a life-long resident of the District of Columbia, was taken October 15, 1875, and formed part of the record of the Steamboat Cases which ~~by stipulation of counsel~~ has been incorporated with this Record at Vol. 4, pp. 1423–64. Mr. Bradley, at that time, was nearly 72 years old. His memory therefore, reverted to an early period of the city's history.

He had known the Dermot map since the date of his admission to the bar, May Term, 1826, and had first seen it when the several acts of President Washington and of President Adams were yet attached to it. He had seen them used in evidence on trials in the Circuit Court of the District of Columbia (Ib., p. 1424). At page 1425 he says:

> "I am not aware that any street called Water street was laid down on any map or plan for the City of

> Washington between the Long Bridge and Greenleaf's Point, now called the Arsenal grounds. Nor am I aware that any continuous street was made there until within a few years past."

He then enumerates eight wharves built and owned by private parties and located, prior to 1826, within the limits just mentioned. At pages 1427–8 he says:

> "As far back as I can recollect, from Lenox's wharf, between 13th and 14th streets, to Greenleaf's Point, at the mouth of the Eastern Branch, the tide flowed up to and struck against the high land north and east of the north line and east line of Water street, so that *there was no shingle or beach where Water street is now laid out except at low tide, when a portion of it only was disclosed*, and from time to time portions of the bluff or high lands were undermined, and fell by reason of the action of the water. You could not pass, even on foot, *except at low tide*, between these points."

Again:

> "Acording to my recollection, for I have seen portions of the north line of Water street surveyed, the whole of the northern line of Water street was within the ebb and flow of the tide, *but it was not defined by any visible object.*
>
> "A sea wall, stone wall, was built near the channel in the line of direction with the channel and the earth filled in *where water street is now defined*, by Mr. George Page, long before the breaking out of the war, he being the owner of part of Square 472, and claiming the right to erect that wharf as appurtenant to his lots in Square 472."

At pages 1449–50 he testifies to the location, in front of the lots and squares of their respective owners, of the wharves known as Bartle's, Lenox's, Cana's, Liekie's,

Brent's, Farl s, Bradley's, Lambell's, and Kimmell's, and to their relat dates of construction:

> "L. .bell built a yard there for the construction and repair of small vessels, and it was situated, as well as my memory serves me, southwest from the southwest corner of Square 391, and the wharf and filling up by him occupied, according to my recollection, the greater part, if not all, of Water street at that time. His wharf and yard projected into the river, and he filled up to the high bank in Square 391. There was no approach to it of wheel carriages of any kind from the east along the shore, but he filled up a road from the upper end of his wharf on shore to William Bradley's improvements so as to make a practicable track" (Ib. p. 1451).

At page 1463:

> "My attention has been called by Gen. Birney to Square 356. My memory is perfectly distinct that almost the whole body of that square was in the water, and the bank was thrown down the back of it for the purpose of filling it up, and the water actually flowed where the building called Jones' Tavern stood a few years ago (p. 1463).
>
> "My earliest recollection of Square 472, there was a road on the west front of it, and a road on the south side of it, at the bend of the high ground and beyond the wharves I have mentioned" (Ib.).

At page 1431 Mr. Bradley explains clearly the origin and purpose of what is known as the Elliott Plan No. 2, which was made by William P. Elliott and adopted by the Corporation of the City of Washington, subject to the approval of President Van Buren for the purpose of regulating the location and building of private wharves south and west of the defined limits of a then projected Water street in the exercise of the implied privilege of wharfing in front of certain lots and squares thereon delineated, February 23, 1839 (see Ex. M. R. 3, Rec., Vol. 1, p. 324).

The deposition of the late George Mattingly (Ib., pp. 1465–98) is not less explicit.

Asked, at page 1478, about his knowledge of a street opposite Square 472 on the present line of Water street, he says:

> "The first thing that I ever saw there that looked like a street was made by old George Page.
>
> "Q. By whom, from time to time, have streets in front of property lying on the present line of Water street been opened or made?
>
> "A. So far as my knowledge is concerned, they have always been made by parties who have erected the wharves."

Reverting to sixty years prior to 1877, he says (p. 1479):

> "From the [Long] Bridge to the Arsenal, in those days, it was a continuous bluff, ranging from twenty to twenty-five feet, right on the shore all the way."

There was no sign of a street.

At page 1481, his enumeration of old wharves agrees with that of Mr. Bradley.

On cross-examination, he reiterates (pp. 1489–90) that the present street was made, in part, by private wharf owners for convenient access to their wharves.

P. 1491. Part of Water street was made by the Potomac Steamboat Company, in front of Squares 473 and 503, at the time their wharf was built at their own expense. Witness also exhibits (pp. 1493–98) receipted bills for taxes paid on wharves. At pages 1473–4 he mentions instances of the *rental* of wharves *by the Government* from private parties during the late Civil War.

The depositions of John T. Fenwick (Rec., Vol. 4 p. 2063), and of Wm. J. Lenox (Ib., pp. 2068–71), taken in this proceeding, establish the acquisition, by the late John Van Riswick, of his wharf opposite Square 503 from the Corporation of the City of Washington as far back as 1848. It was conveyed, as shown by the deeds heretofore referred to,

with expressed right to build wharves, etc. This is the Nicholson wharf of 1797. When Mr. Van Riswick bought no street intervened between it and the upland lots in Square 503. He cut down the bluff and graded the way as an access to his wharf (pp. 2065–6), at his own cost.

William R. Riley testified as to his own properties (pp. 2071–75).

The depositions of George W. Cochran (pp. 2075–83), Henry L. Biscoe (2083–6), James L. Barbour (2086–9), James O. Carter (2090–2) and Edward M. Willis (2093), refer to the ownership, condition, improvement and cost of the wharf belonging to the Great Falls Ice Company opposite Square 356.

The street thus made, in part, by private enterprise and at private cost since 1826, became thus impliedly dedicated by its owners to the Municipality of Washington City for use as a public way. And the formal acceptance of such dedication is conclusively established by the adoption by the city, with the President's approval, of the William Elliott Plan No. 2. Without such formal acceptance, and in the absence of a grant by the property holders, it might have been, even now, difficult for the municipality to prove the dedication, for the court said many years ago in reference to a street similarly located in the town of Alexandria:

> "From the very nature of wharf property, likewise, access must be kept open for the convenience of the owner and his customers; but no one ever supposed that the property thereby became public instead of private."
>
> Irwin *vs.* Dixion, *Supra.*

Counsel for appellee assert broadly at p. 129 of their brief when treating of L'Enfant's Map of 1791, "that the first sale of lots in the city was made according to this plan October 17, 1792," and they refer to certain advance suggestions made by the Commissioners to the proprietors and to the advertisement of sale in support of their statement, but they

overlook, apparently, the President's declaration at p. 131 of their brief—

> "Major L'Enfant refused the map of the Federal City when it was requested by the Commissioners for the satisfaction of the purchasers at the sale."

It is difficult to perceive how the sale could have been conducted according to a plan which was purposely withheld.

The Boston Engraving of Ellicott's map was imperfect and virtually suppressed. The proof arrived in time to be exhibited at the second public sale in October, 1792. A few copies, only, were exhibited thereat. The Philadelphia impression arrived too late to be used at said sale. No other public sale appears to have been made. So far, therefore, from all sales being made in reference to these maps, as is reiterated in the brief, but one of the public sales appears to have been so conducted, and that with reference to a few copies of the more imperfect of the two maps.

That the President should have been solicitous to preserve as strict adherence to the Engraved Plan as practicable is at once natural and commendable. It had been widely published with a view to supplying as speedily as possible the daily increasing need of those "grants of money," which only the sales of lots could supply. It had become in some part, a pledge of public faith. But the plan, unfortunately, lacked the verification of ground surveys, and as these approached completion it was found to be fatally defective. While the President, therefore, insisted, on the one hand, that no purely capricious deviation should be made therefrom he was careful, on the other, to withhold the stamp of ultimate approval from work which each day's exploration of the ground showed to be more unreliable.

Counsel are compelled to recognize the authority of the Dermot Map, but they seek to lessen its effect by the claim that it is only the amplification of a pre-existing and duly

constituted plan of the city, to wit: the Ellicott Map. This, however, will not do. The power conferred upon the President to approve was, as we have shown, self-consuming. It was exhausted in the execution. It hardly needs the concurrence of the three Attorneys General already quoted to sustain this position. Besides, there can be but one authoritative plan of the city. Otherwise its affairs would be plunged into inextricable confusion. Admit the principle that more than one plan can be recognized, and it needs no experience to demonstrate that chaos would supervene upon the administration of municipal affairs. And yet the court is gravely called upon, by the appellee, to recognize equal authority in respect of no less than three maps—Ellicott's, Dermot's and the King Portfolio. Nay, more, to these the ingenuity of counsel would add a third in the shape of no less than twelve fugitive sheets, recently recovered from the irresponsible custody of a gardener who is said to have received them twenty-seven years ago from their official custodian whose motive for parting with them is wholly undisclosed. It is difficult to imagine a more flagrant departure from recognized rules of evidence than is exhibited by the attempted introduction of these so-called sheets, unless it be in the extravagant attempt to identify them as the work of Nicholas King by the opinion of a witness who has not only never known him, but who testifies nearly a century after the work is assumed to have been done. The testimony on this point is that of John Stewart, and appears Rec., Vol. 4, pp. 1630–43. The examination took place December 5, 1890. The witness, from a prepared statement in writing, deposes at page 1630 that he had recently received from George H. Brown, public gardener, a series of plans, twelve in number.

> "Mr. Brown informed me that he obtained these maps from the room in the Capitol where the old records of the city of Washington were then kept, in June or July, 1871; that he took them from said

> room by the authority of General O. E. Babcock, of the Engineer Corps, U. S. A., who was then in charge of public buildings and grounds, and that he (Brown) had retained them in his possession ever since."

Witness hastens to add:

> "I took charge of the early city records August 17, 1876, and was not aware of their existence until they were handed to me by Mr. Brown and returned to their proper place of deposit."

At page 1691 witness says that he obtained the plans from Brown October 22, 1890, but admits that he was told "sometime between the years 1876 and 1880" that Brown had taken "some plans out of the office which he never returned." There is no pretense that this self-constituted custodian of an alleged public record and actual gardener was inaccessible. Yet his testimony nowhere enlightens this voluminous Record. He appeals to us vicariously and through the medium of a custodian whose self-imposed mission seems to be to resurrect rather than to preserve. Inadmissible as those sheets are upon every recognized principle of the law of evidence, their further consideration would seem to be unwarrantable.

Counsel are right in ascribing to Mr. King the high qualities of a good citizen. It was his progressive spirit that urged him to supply the absence of a throughfare along the river front which should accomplish the ends of sanitation, which he so much insisted upon. Had he been sufficiently skilled in the law to appreciate the effect upon private rights of the interposition of such a street it is more than doubtful whether his manifest regard for those rights would have permitted him to advocate its construction.

At page 145 the King Plan is declared to have been in process of preparation in the year 1797, and the only proof offered is the fact that King was assistant surveyor from

September 21, 1796, until September 21, 1797—just a year. This is almost as conclusive as the logic of Stewart. Again the plan is said to show "the street along the Potomac River shown on the Engraved Plan;" but the Engraved Plan shows no street, but only a space along the river which even the ingenious Stewart is unable to distinguish from the shore (Rec., Vol. 2, p. 643).

Mr. Stewart is introduced to the court as a skilled surveyor. Upon being examined as to the delineations on the Ellicott Map, he says as follows:

> "Q. While you have those two maps in your hand, will you look at the river front, as indicated on the Engraved Map, and describe what is between the indication of water and the squares; or what does that white line indicate along there?
>
> "A. It indicates edge of the water.
>
> "Q. And what is the other?
>
> "A. Wharves.
>
> "Q. That indicates land abutting out there between the squares and the water?
>
> "A. Exactly.
>
> "Q. Will you look at the Dermot Map and see if that is indicated upon that map?
>
> "A. No, sir.
>
> "Q. Nothing of that kind is indicated there?
>
> "A. No, sir. The water line on the Dermot Map, to some extent, abuts close on the squares, and in some instances passes through them, and in some instances passes clear of the squares."

The logic which would evolve fact from mere opinion is strikingly exhibited in the effort to identify Davidson's "elegant and descriptive work now going forward in your office" with the King Portfolio Map. Here the analytical Stewart is again called to the front and gives plentiful reasons for the faith within him, but—nothing more.

Since counsel for appellee are so free in the use of Stewart, it surely will not be objected that we invoke him in our own behalf. The degree of authority to which the King Port-

folio is entitled is thus shown by him. (Rec., Vol. 2, p. 609).

> "Q. Is there anything within that portfolio upon these plates, or within your office, that shows that these plates were prepared by authority of Congress, or of the President of the United States, or by any official authority?
>
> "A. No; I do not remember having ever seen any instructions to Nicholas King to prepare them.
>
> "Q. Is there anything upon these plates, or within your office that shows any official approval of those plates?
>
> "A. I cannot say at present that there is.
>
> "Q. To your knowledge is there any?
>
> "A. No, not to my knowledge; I do not remember coming across anything of the kind."

Having admitted acquaintance with the Dermot Map, he is asked:

> "Q. Is that the map under which the exchange and sales of lots in the city were made by the Commissioners?
>
> "A. Yes, sir.

At p. 296 the not very definite claim is made that—

> "all rights of Notley Young under his deed in trust were finally fixed and determined while the Engraved Plan was the only plan of the city."

If by this is meant that the division between Young and the public occurred before the only plan of the city had been approved, the statement, to that extent, is admissible. But what of that? Young's rights could only be adjusted by his deed, and that they were actually so adjusted is shown by the certificates of division with Young copied into the Register of Squares, whereon the Commissioners certified that certain squares "REMAIN to *Notley Young agreeably to his deed of trust.*" It was not for the Commissioners, by any act of their own in approving returns of surveys, to defeat the

rights of Notley Young. The Commissioners were creatures not creators of the rights of others. It was not for them to constitute a street by the mere approval of a surveyor's return—or at all. That power resided alone with the President. It made no difference what might have been the fanciful call for boundary. It could neither make nor unmake a street. There was no time limit upon the determination of Young's rights. They were guaranteed him in their amplitude by his trust deed, and, until fully admitted, their claim to recognition would be continuous. His conveyance was of all the land that might be necessary, in the President's judgment, for a city—not his entire lands, at all events. Had the President seen proper to exact the full property in the river shore which had been confirmed to Young by the Act of 1785, it might have been conceded in proper terms. *It was not exacted, and fell back to Young on the equitable principle that recognizes the appellee's ownership of the unconveyed streets.*

On referring to the communication of Freeman (Rec., Vol. 4, p. 1595), mentioned at the foot of page 297, it is evident that the Water street on Potomac River which is therein said to be adjusted and bounded is the section of street west of Rock Creek, and not affecting Notley Young's land. In fact, no Water street was adjusted and bounded between Fourteenth street and the Arsenal before the adoption by the city of Elliott's Plan No. 2, and its approval in 1839. Its actual construction was postponed until thirty-five years afterwards. No authoritative plan indicates such a street between these points, and the contemporaneous documentary evidence proves conclusively that it existed in 1796 as a project vague and imperfectly defined in the minds of a very few persons connected with municipal affairs.

The documentary evidence in the case shows conclusively that Water street, as now established, had not even a potential existence before 1839, the year of the approval of

Elliott's Plan No. 2. The power of the President to accept streets and to acquire the fee simple title therein for the use of the United States under the deeds in trust, had been, long since, fully exercised and exhausted. The street, as projected on the Elliott Plan and now established, is a result of the intermediate creation by private owners of an easement for a public way by implied dedication to the corporation of the city of Washington *to that use alone.* As declared by this court in Railroad Co. *vs.* Schurmier, *supra*, the city holds the title to the street only in trust for the purposes of its dedication as such, and the title *remains* in the grantees of the original proprietor *for all other purposes*, with a property right in its use as a street for the adjacent land. This is agreeable to the Roman Law Dig. pr. 1, De Serv. Praed. (1–2). Were it otherwise, in fact, or if it were allowable to concede, *argumenti gratia*, in the face of the present Record, that the fee simple title to Water street, as recently established, resides in the United States, the latter is yet confronted by an insuperable barrier to the enjoyment of riparian rights, as appurtenant thereto, by the Convention of 1785, which invested the original proprietor with full property in the shore of the river to the south and west of the street. If this constituted "a seizin of the land covered by water" and implied "ownership in the soil of the shore between high and low water mark, as land," (to use the words of the majority opinion in 109 U. S. at p. 685), while it might not "pass as an appurtenance by a deed conveying the adjoining land," it was, nevertheless, clearly reserved to the original proprietor, his heirs and assigns, by that provision of the deed in trust which imposed upon the trustees the duty to convey to him "any part of the said bargained and sold lands, if any, which shall not have been laid out in the said city." Upon either hypothesis, therefore, the claim of the United States must be rejected.

The opinion cites the Maryland Act of January 22, 1785, giving to the citizens of Georgetown the right to wharf in

front of their respective lots at the north side of Water street, as proving, by way of exception, the general rule, which, it is claimed, denied such right. *But it is to be remembered that this legislation, for a particular area, anticipated by, just two months, the Act of March 28, 1785, which extended the so called exception into a rule of general application to the property along the river shores.*

It is doubtful whether the injustice of the claim advanced on behalf of the United States, and its untenable character, can be better exhibited than it is by the terse language, vigorous reasoning and acute analysis of the great jurist who delivered the dissenting opinion in the case just cited. Applying the crucial test of equality to the distribution of land under the deeds in trust, he destroys by the force of resistless logic the finely-spun theory which denies to the citizen continued possession and enjoyment of his century-tested right. It is difficult to see wherein the principles recognized in Doane *vs.* Broad Street Association, 6 Mass. 332, and in Hathaway *vs.* Wilson, 123 Ib. 359 are lacking in application to this case or how the decision of Judge Cranch in Chesapeake and Ohio Canal Co. *vs.* The Bank, 5 Cr. C. C. 509 can be dismissed as entitled to no weight. The reasoning of the late Mr. Justice Miller will, we feel assured, commend itself with additional force to the court's consideration in view of the ampler record which is now before it.

As here presented, the question is *res integra.* For the only time the United States is here as a party and upon its own solicitation. To say to these appellants, at the end of twelve years of active preparation in the vindiction of their rights, that nothing remains to adjudicate is to break the promise at once to the ear and to the hope. It is not to be assumed, for an instant, that the invitation broadly extended by the Act of 1886 to come in and submit to the equitable adjustment of possibly conflicting rights was not made in all sincerity by the appellee. Its entire conduct since the date of the decision in 109 U. S.—

fifteen years ago—is a refutation of such unjust suspicion. It is not believed that the decision will find support from the record in this case. It proceeded, exclusively, upon the supposed interposition of a Water street between the points already mentioned. The evidence, oral and documentary, here produced shows, conclusively, that no such street existed outside the imagination of a few, even potentially, until 1839, and none actually until 1874; that the implied dedication of the existing street carries with it no other use by the public than such as appertains to a way, and that every appurtenance to fee simple ownership that can be enjoyed in subordination to such public easement, resides with the private owner. This includes, of course, his right to wharf at the river-side of the street. Finally, the clear, strenuous and just principles laid down in the dissenting opinion in 109 U. S. 642, are invoked with confidence for the adjudication of the more fully developed facts of this proceeding.

It is, therefore, respectfully submitted that the decree of the Supreme Court of the District of Columbia should be reversed so far as it affects the appellants above named.

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